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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. DANNY JOE STEARMAN, Defendant and Appellant.	C075937 (Super. Ct. No. CRF132279)
THE PEOPLE, Plaintiff and Respondent, v. DAVID EARL BRISTOW, Defendant and Appellant.	C076323 (Super. Ct. No. CRF132279)

Driving to work at around midnight on a desolate Yolo County Line road, his van slowed by a partially deflated tire, Mark Cullen's path was suddenly blocked by a white

pickup that sped ahead and then stopped in front of him. Forced from his vehicle at gunpoint by a passenger from the pickup, Cullen tried to run but was stopped, beaten, knifed, shot, run over by his own van and left for dead, but lived to identify his attackers, defendant Danny Joe Stearman, the uncle of Cullen's ex-wife with whom he had been embroiled in a heated child custody dispute and David Earl Bristow, Stearman's friend, paid to assist in this murderous enterprise. Convicted in a joint trial before separate juries of conspiracy to commit murder, attempted murder, assault, and associated enhancements, they appeal. Neither disputes the sufficiency of the evidence, though Stearman contends the court erred in admitting certain evidence—testimony from his brother, the father of Cullen's ex-wife, regarding advice he received from lawyers as to what would happen to his grandchildren if one of the parents were to die—and in excluding other evidence, testimony regarding Cullen's drug use prior to 1998. Bristow's single argument on appeal is that the court erred in denying his *Batson*/*Wheeler* motion.[1] We shall affirm the judgments.

FACTUAL AND PROCEDURAL BACKGROUND

The Indictment

A consolidated amended indictment charged Stearman and Bristow with conspiracy to commit murder (Pen. Code § 182, subd. (a)(1)) (count 1),[2] attempted murder (§§ 21a, 664, subd. (a), 187, subd. (a)) (count 2), and assault with a firearm (§ 245, subd. (a)(2)) (count 3). The indictment charged Stearman individually with assault with a deadly weapon (§ 245, subd. (a)(1)) (count 4), and Bristow individually with assault with a deadly weapon (§ 245, subd. (a)(1)) (count 5).

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[1] *Batson v. Kentucky* (1986) 476 U.S.79 [90 L.Ed.2d 69] (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

[2] All further statutory references are to the Penal Code unless otherwise designated.

With respect to count 1, it was alleged defendants used a deadly weapon (§ 12022, subd. (b)(1)), personally used a firearm (§ 12022.53, subd. (b)), and personally inflicted great bodily injury (§ 12022.7, subd. (a)), and that Stearman personally discharged a firearm (§ 12022.53, subd. (c)) and personally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)). As to count 2, it was alleged that the attempted murder was willful, deliberate, and premeditated (§ 664, subd. (f)), that defendants personally inflicted great bodily injury (§ 12022.7 subd. (a)), that Stearman personally used a firearm (§ 12022.53, subd. (b)), personally discharged a firearm (§ 12022.53(c)), and personally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)), and that Bristow used a deadly weapon (§ 12022, subd. (b)(1)). As to count 3, it was alleged that Stearman personally used a firearm during the commission of a felony (§ 12022.5, subd. (a)) and personally inflicted great bodily injury (§ 12022.7 subd. (a)). With respect to count 5, it was alleged Bristow personally inflicted great bodily injury (§ 12022.7, subd. (a)).

The Evidence

The evidence of guilt is extensive. Defendants do not claim the jury's verdict lacks substantial evidence to support it. We summarize the most cogent portions of the record supporting the verdict as well as those portions relevant to the arguments raised on appeal.

a. Motive. Family Matters: The Relationship Between Cullen and Defendants

The victim, Cullen, met Stearman's niece, Deana Stearman, in 2006 or 2007. Cullen and Deana began a relationship, and Deana moved in with Cullen and his son. The couple married and at the wedding Cullen met Stearman. Cullen and Deana had two children, a boy born in 2009, and a girl in 2011. Over the years, Cullen saw Stearman at family functions on numerous occasions.

Theirs was not a happy marriage. In 2010 Deana was arrested for domestic violence. Cullen was once arrested after slapping Deana and leaving a bruise on her

temple. After Deana gave birth to their second child, she moved in with her parents, Doyle and Madeline Stearman. Cullen lived a few houses away in a home rented from Deana's parents but eventually moved.

In April 2011 Cullen went to court over visitation. The court issued a temporary order requiring the couple's son to stay with Cullen and their daughter to stay with Deana. The couple also exchanged custody for one hour every other day at a nearby gas station. During these exchanges, Deana's parents accompanied her.

The acrimony between the couple was fully exposed to the Stearman family. A month or two before the attack, Deana and other Stearmans were in Bakersfield for her grandfather's funeral, on a weekend Cullen was scheduled to visit the children. When Cullen called to speak with his children, Stearman got on the phone and said, "You don't want me to come down there." Cullen felt Deana was not complying with the court order over visitation. He took Stearman's remark as a threat.

Deana's father Doyle is Stearman's brother. Doyle was aware of the ongoing custody dispute between Stearman and Cullen. Deana lives with Doyle and has custody of the children most of the time. When the family returned from Bakersfield, Cullen arrived to pick up the children. Doyle told him to wait because he wanted the sheriff to be present at the exchange. Because of the animosity between Cullen and the Stearman family, Doyle wanted a neutral witness. On another occasion, the following week, Doyle contacted the sheriff's department complaining of Cullen's violation of the custody agreement.

Stearman treated Cullen as a threat to the family. He once stayed at Doyle's home when Doyle and his wife went out of town because Cullen had made threats and they did not trust him. Doyle had a handgun for protection. Stearman gave Doyle a nine-millimeter semiautomatic handgun in a holster. In the house when Doyle and his family left town were a single action .22 caliber and the semiautomatic nine millimeter that Doyle received after his father's funeral in Bakersfield.

The last time Cullen saw Stearman prior to the attack was the weekend before when he went to pick up his children at Doyle's house. Stearman was very hostile and told Cullen he had better take care of what is "owed."

b. The Attack

Around midnight on September 30, 2012, Cullen left to work his midnight to 8:15 a.m. shift. Although Cullen believed the tire pressure on his van was low, he was late and drove on. As he drove, a white Toyota pickup passed him, a vehicle he had seen near his house when he left for work. The pickup sped past him and then stopped.

Cullen stopped his van in the middle of the road. A person Cullen did not recognize got out of the passenger side of the pickup and ran to Cullen's van. The person wielded a gun and yelled at Cullen to get out of the van, pounding the gun on the passenger-side window.

Cullen got out of the van and tried to run. Stearman, the driver of the pickup, ran to stop him. Stearman punched Cullen in the face and he fell to the ground. As Stearman punched him, Cullen felt a gun at the back of his head and heard Stearman yelling, "shoot him, shoot him." The gun went off and Cullen collapsed.

Cullen saw two bright lights and heard voices asking if he was dead. Someone said, "I will finish him off." Cullen began struggling with Stearman. Stearman pointed a gun at Cullen's chest. They struggled and the gun went off, hitting Cullen in the left arm and exiting through his chest. After the shooting, the slide of Stearman's gun remained "stuck in the open position" and Stearman began to curse.

Cullen felt fingers in his mouth, bit down, and felt a knife cutting his tongue. Cullen's tongue was lacerated and his neck was cut from his mouth to behind his right ear. Stearman and the other attacker took Cullen's van.

As Cullen got to his feet, he heard an engine revving. A car came toward Cullen, striking him, and he slid onto the hood and onto the windshield. The driver got out, pulled Cullen off the windshield and threw him to the ground. Cullen did not recognize

his assailant. The person said, "Die, bitch." There was red fluid on the hood and the windshield.

Cullen's cell phone rang. His coworker, Victor Bustamante Navarro, was calling because Cullen had not shown up for work. Cullen told Bustamante he was dying and told him where he was. Cullen then called 911.[3] Although the wound to his tongue made Cullen difficult to understand, he said he was dying and Danny had done it.

Bustamante and Miguel Ambriz found Cullen in the middle of the road, covered in blood. Bustamante had not called 911 after speaking to Cullen because he did not know the extent of Cullen's injuries. Bustamante called 911 after reaching the scene.

An officer arrived and asked Cullen who had attacked him. Cullen said his ex-wife's father and attempted to say a last name. Bustamante could not understand what Cullen was trying to say, but it started with an "S" and sounded like "Searman" or "Silverman." Cullen said something about his ex-wife and father. Cullen had previously mentioned his divorce and subsequent custody issues to Bustamante.

c. The Law Enforcement and Medical Response

Sheriff's deputies Nick Morford and Andrew Livermore arrived on the scene. Cullen's face and neck were covered in blood, and Morford saw deep cuts on his neck, throat, hands, and wrists. Cullen told Morford he was dying and that he had been carjacked and stabbed. Bustamante told Morford that Cullen said his ex-wife and uncle, or ex-wife and father, were involved in the attack. Morford asked Cullen if his ex-wife was involved and Cullen replied, "Danny Steelman." When Morford repeated the name, Cullen confirmed it was Danny Steelman.

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3 The 911 call was played for the jury.

Officers located Cullen's van and found blood on the front bumper, hood, and cracked windshield. The driver's window was open, the keys were in the ignition, and the rear passenger tire was flat.

A DNA swab taken from the van's headlight switch was a mixture of two contributors: Cullen, the major contributor to the DNA profile, and Stearman, the minor contributor.

Cullen suffered a six-inch cut to the right side of his neck, a slash wound to his chest, and massive blood loss. He also suffered a bullet wound to his neck. The bullet entered Cullen's mouth, went through his tongue and out the back of his neck, or went through his neck through his tongue and out of his mouth. Cullen also had bullet fragments in his neck. Cullen's wound was consistent with a .22-caliber round. Such a weapon was found in Cullen's van.

While in the intensive care unit, Cullen tried to tell officers what happened, but his injuries prevented communication. Eventually, Cullen was able to communicate with Detective Jennifer Davis by blinking in response to questions. He also communicated via a notepad and identified Stearman as one of his attackers but could not identify his second assailant.

d. Stearman's Arrest

Officers arrested Stearman on October 9, 2012, and codefendant Bristow on June 12, 2013. Stearman had a cell phone and an envelope with $2,000 in $100 bills. Stearman's wallet contained approximately $200.

Detective Dean Nyland interviewed Stearman.[4] Nyland, trained in cell phone technology, was designated as an expert on cell phones, tracking of cell phones, and general cell phone technology. Nyland obtained Stearman's contact information for his

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4 A recording of the interview was played for the jury.

cell phone and home phone. Nyland found a third number, which Stearman identified as belonging to Jimmy Kellet or his daughter Angela Stearman. Nyland asked if Stearman used any other phones in October 2012. Stearman said he purchased a phone at Rite Aid but lost it the same day.

e. Cell Phone Linkages

Cell phone calls linked Stearman and Bristow on the day and evening in question. A search of Stearman's cell phone records on September 30 and October 1 revealed calls to codefendant Bristow. A search of Doyle's and Bristow's cell phone records revealed a telephone number common to both phones. The number belonged to a TracFone cell phone model purchased from a Rite Aid store. A tracking device on the phone was activated at about the same time Stearman stated he purchased the phone from Rite Aid. Bristow called the TracFone in the early morning of September 30, 2012. There were multiple calls the same day. There were calls between the TracFone and Doyle and Angela's phones. Bristow's phone records revealed early that morning his phone was being used in Yuba City. A short time later, the phone was used in the Meridian area, between Williams and Yuba City.

f. Admissions

1. John Winterset's Testimony

John Winterset, Jr., has known Stearman for approximately 40 years and is also familiar with Doyle, Madeline, and Deana Stearman. In 2010, while at Doyle's house with Stearman, there was a discussion about the issues between Stearman and Cullen. Winterset knew Bristow because Bristow was in business with Stearman.

Winterset was present at the funeral of Stearman's father. Doyle was on the phone with Cullen, who was being unreasonable. Stearman told Cullen to leave them alone and let them get through the funeral. Winterset thought Stearman commented that Cullen did not want Stearman to visit him. Around the time of the funeral, Winterset saw Stearman

give a holster and what appeared to be a pistol to Doyle. Doyle said he wanted it for protection.

Stearman told Winterset that he and Cullen had a confrontation at Doyle's house. Stearman was there to babysit his niece and nephew and take care of Deana while Doyle and Madeline Stearman were out of town. During a custody exchange, Stearman and Cullen got into an argument.

Stearman gave Winterset his credit card before he and Bristow went to Northern California. Stearman said he needed an alibi. Although Stearman did not tell Winterset to use the credit card, Winterset did so. Stearman took Winterset's Toyota Camry, which Winterset loaned him in July 2012. The day Stearman left, Winterset used the credit card to buy cigarettes and gas.

When Stearman returned he was somber and told Winterset he paid Bristow $5,000 to go with him. Winterset knew in his heart what the money was for. Stearman told him he had traveled north and knocked on Cullen's door, and they began to fight. Based on his knowledge of Stearman, Winterset believed he would never do anything more than fight. Stearman's knuckles were injured.

Stearman also told Winterset that after he attacked Cullen he threw a gun in the river. Stearman said they had acted like monsters when they attacked Cullen. Although he heard only bits and pieces about the incident, Winterset became concerned about what had happened.

After Stearman's arrest, Winterset spoke with Bristow. Bristow told him they had flattened Cullen's tire and ran him off the road. Bristow said Stearman was driving. Bristow said "I can't believe it. I stuck him deep." He also told Winterset that Stearman would not get out of the way. Winterset never told detectives about Bristow's comments because he thought Bristow had made a deal with the police.

Bristow later came to Winterset's home and asked for $2,000 so he could finish the job. Bristow made the request after he learned Cullen was still alive.[5]

Although Winterset read about the attack on Cullen and about Stearman's arrest after Bristow's statements, he did not tell authorities. After he received a subpoena to testify before a grand jury, Winterset decided to tell the truth. He told the grand jury that Bristow said a gun was involved and that he had shot Cullen, but in an inefficient way. According to Winterset, this meant that as Stearman and Cullen were fighting, Bristow could not get a clear shot at Cullen.

Winterset was later threatened by acquaintances of Bristow, including a person who grabbed him by the throat and threatened to cut his head off.

2. Paula Davis's Testimony

Paula Davis is Bristow's cousin and also knows Stearman. In 2012 Bristow told her someone associated with Stearman had been attacked. Bristow told her he had gotten into a confrontation with someone and had stabbed him. He said the man had been molesting Stearman's grandchildren. The man had been shot, but Bristow did not say who shot him. The man did not die. Before the grand jury, Paula testified that Bristow was paid to do it and was supposed to be paid $5,000 but only received $3,000.

g. Bristow and Stearman's Movements

Bristow's son David, as well as his ex-wife Theda Kuney, recalled that Stearman accompanied Bristow when Bristow moved David from Bakersfield to his mother's apartment in Yuba City in September or October 2012. Bristow drove a pickup truck and Stearman drove separately in a Toyota.

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[5] Winterset's son Jason testified that after Stearman's arrest, Bristow made a comment about needing money. Bristow asked Winterset for $2,000 to go up north.

DEFENSE CASE

Stearman's Testimony

Stearman testified in his own behalf. At the time of trial, Stearman, aged 65, had no prior arrests. He served six years in the military, had two businesses of his own for a time, and worked for a sign business until his retirement in 2002. Stearman was not a violent person and had never threatened anyone with a knife or gun. Stearman met Cullen prior to Cullen's marriage to Deana and saw him at family functions. In the past, Stearman used illegal drugs, including methamphetamine, but stopped in 1998. He began using again after his wife passed away. He and Cullen used methamphetamine together. Occasionally, when Cullen lost his "connections," Stearman supplied him with methamphetamine. Stearman believed Cullen and Deana used amphetamine after their marriage.

Stearman was aware of conflict between Deana and Cullen over child custody, conflicts in which he also became involved. He recalled a tense telephone conversation with Cullen that took place following a succession of family deaths and funerals. Cullen demanded to talk with his children who were out of town with their mother at a family funeral. The conversation caused Deana's mother, Madeline, to cry. Stearman took the phone and told Cullen he could talk to his children but should not harass the family. He added, "Don't make me come down there," but it was only a family saying, "not a big deal."

Stearman traced the events on the evening and early morning of September 30 and October 1 to another angry encounter between the two after Cullen had turned Deana in for allegedly disobeying the custody order. When Cullen dropped off the children, Stearman told him he was upset about Cullen's actions because Cullen had done the same thing by leaving the children with his brother when he went to work. Cullen became angry and Stearman told Cullen if he tried to hit him, he would "whip his ass."

Cullen and Stearman later ran into each other at an intersection. They got out of their cars and Cullen was friendly and asked if Stearman was still angry. Stearman said he was and Cullen assured him he would make things right with the district attorney. Cullen also asked if Stearman could get him some methamphetamine. Stearman agreed, reasoning that he could get back at Cullen if Cullen was caught with drugs. Stearman told Cullen his friend, codefendant Bristow, was moving his son to the area that weekend. Stearman agreed to make sure Bristow brought drugs. Cullen said he would meet Bristow on his way to work after midnight.

Stearman bought a TracFone for his grandson at a drugstore in Shafter. He activated the phone before he returned to Yuba City to help Bristow move his son. The phone was stolen after Stearman returned from the move. Before he left for Yuba City, Stearman gave John Winterset the credit card to put gas in Stearman's truck, which Winterset had borrowed. However, Stearman never told him to use the credit card to create an alibi. Stearman knew Winterset for about 40 years and the duo had used methamphetamine together.

Stearman helped Bristow move his son and drove a Toyota Camry he borrowed from Winterset. He took a separate car because he had errands to run after the move. After moving Bristow's son, Stearman and Bristow went to a hotel. They left to meet Cullen and saw his vehicle moving slowly because of a flat tire. Stearman drove around Cullen, pulled up next to him, and Cullen pulled over. Bristow got out and Stearman pulled over around the corner. Stearman did not force Cullen off the road.

Bristow got out and Stearman pulled forward because he saw headlights coming. As he waited for Bristow to meet with Cullen, Stearman saw a flash and heard a sound like a firecracker. Stearman saw Bristow and Cullen fighting in the street. Stearman got out and went to Cullen's van. Stearman had not brought a gun and did not know whether Bristow had.

Bristow told Stearman to get the drugs out of the van. Stearman got into Cullen's van looking for the drugs and heard gunshots. Cullen was shooting in Stearman's direction and Stearman put the van in reverse, then pulled forward. After he stopped the van, he found the drugs on the floor. Stearman drove the van forward as Cullen jumped on the hood. Stearman stopped and Cullen pointed the gun at him.

Stearman realized Cullen was hurt when Cullen jumped on the van and he saw blood. Stearman had not fought with Cullen; any fighting was between Cullen and Bristow. After his arrest, Stearman did not tell Detective Nyland about the drug deal because he did not want to connect it to Bristow.

Bristow later told Stearman that when he got in the van, Cullen pulled out a gun and told him to get out. Bristow grabbed the gun and it went off. Bristow and Cullen struggled over the gun, which went off and shot out a window. Bristow was frightened on the drive back to the hotel. They did not stay at the hotel because Stearman wanted to go home.

Stearman did not like the way Cullen treated his family. However, they bonded over drugs. Stearman did not want to kill Cullen. Following the incident, Stearman bought a Corvette for $6,000 in cash. The money left over from the purchase was in the envelope found when he was arrested.

Detective Young's Testimony

Detective Brian Young interviewed Cullen in February 2013. Cullen told him about an incident in which two people forced him off the road, seven or eight months before the attack. He was driving to work around midnight when a vehicle forced him off the road. The truck, an older Toyota, pulled up alongside him and a passenger wearing a stocking over his head waved a gun at him. Stearman got out of the driver's side of the truck, and he recognized the man with the stocking as John Huston. Stearman and Huston threatened him and told him to back off the custody issues. If he did not, they would come back and finish the job. They warned Cullen not to notify police

because no one would believe him. Cullen did not report the incident because he did not have any proof.

Cullen told Young that for many years he had been subjected to random drug testing, and he was still being tested at his current job. The testing averaged about two times a year since 1998.

Young searched Stearman's home on October 9, 2012. He seized some handguns, including a .22 caliber. Young found two .22-caliber revolvers, one .357-caliber revolver, and three semiautomatic nine-millimeter handguns. He also discovered what he suspected was methamphetamine and a glass smoking pipe.

Abimael Ramirez's Testimony

Abimael Ramirez worked with Cullen. He knew about the attack on Cullen, who was hospitalized in October 2012 and was off work. Prior to the attack, Cullen never told him about the prior incident.

Detective Davis's Testimony

Detective Davis spoke with Cullen at the hospital following the incident. Although Cullen could not speak, he could shake his head indicating yes or no and move his hands to mean he was not sure. A few days after the incident, during an interview, Cullen shook his head no, indicating Stearman did not shoot him. However, in previous interviews Cullen affirmed Stearman and another individual were involved. Cullen indicated Stearman had shot him and was armed with a knife. The first time Davis asked Cullen if he knew he was shot, he shook his head yes and indicated he had been hit by a car.

Davis asked Cullen if Stearman had a gun, and he shook his head yes. Later, Davis asked if Stearman shot him and Cullen indicated he did not know. When Davis asked if the other person shot him, Cullen indicated yes. Cullen indicated he knew who had cut him, but also indicated he did not know if Stearman had cut him. He did indicate the other person had cut him.

During the October 3, 2012, interview, Cullen described Stearman's clothing. When Davis asked if Stearman had a gun, Cullen indicated yes. When she asked if anyone else had a gun, he shook his head no.

An October 9, 2012, interview was recorded, with Cullen able to speak. Cullen said Stearman drove the car and there was a passenger. The passenger approached Cullen's van with a gun. When Stearman got out of the car, he punched Cullen several times while holding a gun. Cullen and Stearman began to wrestle and the gun went off. Cullen did not believe he had been shot. Cullen thought the gun was a semiautomatic but did not know if there was more than one gun. He did not know what vehicle hit him or who was driving. Cullen was not sure if the vehicle hit him.

On October 15, 2012, Cullen called Davis. He said he did not want to falsely accuse anyone but thought the second person might have been John Huston. However, Cullen never mentioned the earlier incident involving Stearman and Huston.

Davis reviewed Cullen's journal. Cullen recorded the incident at the funeral, but there was no mention of the earlier incident of Stearman and Huston forcing him off the road.

A recording of an interview was played for the jury. Cullen remembered, for the first time, being shot in the neck. He said Stearman stood over him, checking if he was alive. A gun went off while he was struggling with Stearman and then another gun went off. He also believed he was hit by his van.

In the first October 2, 2012, interview, Cullen took a piece of paper, and when Davis asked who hurt him he wrote down Stearman although he misspelled his name. In the numerous interviews Cullen changed things considerably.

John Huston's Testimony

Huston is Stearman's sister-in-law's brother. Cullen was married to his niece Deana. Huston denied forcing Cullen off the road. Huston testified about an incident when his sister and brother-in-law were out of town and did not trust Cullen around

Deana. Huston went to their home and found Stearman. Cullen carried one child to the car and Stearman carried the other. Suddenly Cullen lunged at Stearman, and Huston put his hand on him and told him it was time to go. Huston did not know what caused the altercation.

Huston told Cullen it was inappropriate to call so many times during the funeral. He also told Cullen he needed to pay for the car that Huston's sister-in-law had given him.

Health Worker's Testimony

Carman Arvizu works at the medical center where Stearman is a patient. He signed in on October 1, 2012, for an appointment. During the exam, Arvizu did not notice any scrapes, bruises, cuts, or other injuries to Stearman's body.

VERDICT AND SENTENCING

Stearman and Bristow were tried together but had separate juries.

Stearman

The jury convicted Stearman on all four counts and found the following enhancements true: count 1, Stearman used a deadly weapon pursuant to section 12022, subdivision (b)(1) and personally inflicted great bodily injury pursuant to section 12022.7, subdivision (a); count 2, an enhancement for willful, deliberate, and premeditated murder pursuant to section 664, subdivision (f), and Stearman personally inflicted great bodily injury; and count 3, personally inflicted great bodily injury.

The court sentenced Stearman on count 1 to 25 years to life plus an additional year for the use of a deadly weapon pursuant to section 12022, subdivision (b)(1), and an additional three years for infliction of great bodily injury pursuant to section 12022.7; on count 2 to seven years to life plus an additional three years for infliction of great bodily injury, both stayed under section 654; on count 3, the upper term of four years plus an additional three years for infliction of great bodily injury, both stayed under section 654; and on count 4 to the upper term of four years, stayed under section 654. Stearman's

total sentence is four years plus 25 years to life in state prison. Stearman filed a timely notice of appeal.

Bristow

The jury convicted Bristow on all counts and found the following enhancements true: count 1, Bristow personally used a firearm pursuant to section 12022.53, subdivision (b), used a deadly weapon pursuant to section 12022, subdivision (b)(1), and personally inflicted great bodily injury pursuant to section 12022.7, subdivision (a); count 2, an enhancement for willful, deliberate, and premeditated murder pursuant to section 664, subdivision (f), personally inflicted great bodily injury, and personally used a deadly weapon; and count 5, personally inflicted great bodily injury.

The court sentenced Bristow on count 1 to 25 years to life plus an additional 10 years because he personally used a firearm, plus an additional year for use of a deadly weapon, stayed pursuant to section 654, plus an additional three years for infliction of great bodily injury; on count 2 to seven years to life, plus an additional three years for personal infliction of great bodily injury, stayed under section 654; on count 3 to the upper term of four years, stayed under section 654; and on count 5 to the upper term of four years plus an additional three years for infliction of great bodily injury, stayed under section 654. The court also sentenced Bristow to one year for each prior prison term enhancement, for a total sentence of 15 years plus 25 years to life in state prison. Bristow filed a timely notice of appeal.

DISCUSSION

STEARMAN'S APPEAL

Doyle Stearman's Testimony

Stearman argues the trial court erred in allowing his brother to testify that a lawyer told him if Cullen died Deana would gain full custody of the couple's children.

Background

During trial, the prosecutor asked Doyle if, during the custody dispute, he had met with lawyers. Doyle replied that they had and the prosecutor asked, "did the lawyer during the divorce proceeding ever tell you what would happen if one of the parents of your grandchildren were to pass?" The trial court overruled defense counsel's objection. Doyle responded: "If one were to pass away, then the children would go to the other," and continued, "I don't think it stipulated to that, but I would assume that's common sense."

The prosecution continued: "So if your daughter were to pass, Mark Cullen would have sole custody of your grandchildren; correct?" Doyle: "It would be his right, correct." Prosecution: "That would be upsetting to you, wouldn't it?" Doyle: "Naturally, yeah." Prosecution: "And if Mark Cullen were to pass, your daughter would have full custody of the grandchildren; correct?" Doyle: "Correct." Prosecution: "And that particular scenario wouldn't be as upsetting to you as the first scenario I gave, would it?" Doyle: "I wouldn't think so."

Discussion

Stearman contends this testimony should not have been admitted as its only relevance was to prove motive. Doyle's motive was not at issue and there was no evidence that Doyle ever communicated this advice to appellant.

Relevant evidence is evidence having any tendency to prove or disprove any disputed fact that is of consequence in determining the action. Courts interpret relevance broadly. (Evid. Code, § 210; *People v. Scheid* (1997) 16 Cal.4th 1, 13.) The court may exclude relevant evidence if the probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice. (Evid. Code, § 352.) We review the court's determination of admissibility for an abuse of discretion. (*People v Alvarez* (1996) 14 Cal.4th 155, 201.)

The Attorney General insists that the prosecution presented ample evidence of the acrimonious custody dispute between Cullen and his ex-wife Deana, Stearman's niece. The evidence also revealed that Doyle and other family members were involved in the divorced couple's contentious relationship. The custody agreement provided the basis for much of the acrimony. In light of this evidence, the Attorney General argues it is reasonable to suppose that Doyle communicated the lawyer's advice to Stearman, thus supplying a motive for Stearman's alleged actions.

Whether the fact that the Stearman family often discussed Deana's custody problems permits an inference that Stearman was told about the lawyer's advice to Doyle is questionable. Clearly, however, any error in admitting evidence of the advice is harmless. The lawyer's advice was unremarkable; what other outcome would a laypeson suppose would ensue when a parent dies, leaving another as the sole surviving parent? It is fanciful to believe, in the face of the overwhelming evidence of guilt introduced at trial, that evidence of the lawyer's advice had any effect on the jury's consideration of this case.

Cullen's Alleged Drug Use

Stearman contends the court erred in restricting testimony regarding Cullen's drug use prior to 1998. This limitation, Stearman argues, denied him his right to confrontation and to present a complete defense.

Background

The argument stems from defense counsel's cross-examination of Cullen regarding his drug use and about his representation that he has long been subject to random drug testing. Defense counsel asked specifically about the drug testing policies at his place of employment, and he responded that he was tested when first hired in 2009 but had only been tested once since then. When asked about a statement he purportedly gave to Detective Young that he had been random drug testing two to three times a year since 1998, Cullen responded that he had been drug tested randomly "a number of times"

from 1998 to 2006 when he worked for Central Valley Building Supplies and he had had numerous jobs and had been drug tested "a bunch of times." He acknowledged that he had not been drug tested on a random basis at his current employment since he started in 2009.

Following cross-examination of Cullen, defense counsel indicated he had witnesses prepared to testify that Cullen used drugs "up to 1998" and argued Cullen's drug use was relevant. Reacting, the court declared: "I think it is unlikely that drug use 20 years, or even 15 years before these events, would be admissible. I would find that the relevance of that evidence, if there is any, is so minimal that it doesn't warrant admission. Evidence of more recent drug usage may be admissible, it just depends on what that evidence is. So I will reserve ruling on that issue until and unless this issue is actually presented by the use of admissible evidence from one of the defendants."

Discussion

Stearman argues the trial court abused its discretion in preventing defense counsel from questioning Cullen regarding his previous drug use and in refusing defense counsel's request to present witnesses to testify concerning Cullen's prior use of illegal drugs. According to Stearman, "[t]he proffered testimony to establish that Cullen was a user of illegal drugs would have corroborated appellant's testimony that the violent incident arose out of a drug deal requested by Cullen."

A defendant must be provided a reasonable opportunity to cross-examine witnesses. However, the court possesses wide latitude to impose reasonable limits on cross-examination. The court considers, among other things, harassment, prejudice, confusion of the issues, witness safety, or questioning that is repetitive or only marginally relevant. (*People v. Ducu* (1991) 226 Cal.App.3d 1412, 1414-1415.) We review the court's imposition of restrictions on cross-examination for an abuse of discretion. (*People v. Farnam* (2002) 28 Cal.4th 107, 187.)

Defense counsel cross-examined Cullen about inconsistencies in the frequency of drug testing at his jobs. Counsel also asked Cullen if he was using methamphetamine "on or about" the day of the attack. Cullen denied using methamphetamine. The focus of Stearman's defense was that the incident was a drug deal, initiated by Cullen, gone bad. The court allowed extensive questioning about Cullen's drug use; it only limited the time frame of Cullen's alleged drug use. How or why Cullen's drug use well over a decade before the events of this case would support Stearman's defense is difficult to fathom. The court's limitation did not amount to an abuse of discretion.

In a similar vein, the trial court did not abuse its discretion in refusing to allow defense counsel to present witnesses to testify as to Cullen's drug use 14 years ago. As the trial court pointed out, such long-ago drug use was of minimal relevance. We find no error.

BRISTOW'S APPEAL

Batson/Wheeler Motion

Bristow argues the trial court erred in denying his *Batson*/*Wheeler* motion. According to Bristow, the prosecutor's use of peremptory challenges on three prospective Hispanic jurors was improper.

Background

Voir Dire

At the beginning of voir dire, the court stated it would permit each side 30 minutes to question the first 20 jurors. Defense counsel asked that voir dire not be limited, but the court disagreed. The court proceeded to question prospective jurors as to whether any knew of the parties or witnesses or the basic facts of the case. Bristow focuses on the questioning of three jurors with Hispanic surnames: E.S., R.G., and N.C.

The court questioned prospective juror E.S. E.S. served on a jury in a criminal case two years previously. The court asked: "Do you remember what the charge was?" E.S.: "Somebody got beat up. I don't recall." The court: "Did the jury come to a

decision in that case?' E.S.: "I believe so." The court: "Were you involved in the deliberation process?" E.S.: "Yes."

The court also elicited biographical information from the prospective jurors. R.G. served as a senior administrative analyst with the Department of Employment and Social Services. E.S. worked for a distribution center. N.C. served as director for the Head Start Program, and her spouse worked for a rental agency.

After defense counsel questioned the panel, the prosecution questioned the panel, noting the time constraints. The prosecution told the panel: "If I don't ask you an individual question, it is not because I mean to slight you, it is just that I'm trying to speed this along as much as I can." The prosecutor proceeded to question several potential jurors.

The prosecution used a peremptory challenge to excuse E.S. and two other jurors. Defense counsel later excused two jurors. Subsequently, both the prosecutor and the defense counsel each excused two jurors.

After the court added more potential jurors, it noted, "I'm giving the attorneys less time to ask questions. They took so little time the first time around, they have some time left." The court, the prosecutor, and defense counsel questioned the new jurors individually. The prosecutor and defense counsel each excused a juror. In the next round defense counsel excused a juror and the prosecutor excused N.C. In the following round, defense counsel and the prosecutor each excused a juror. Defense counsel then excused a juror and the prosecutor excused R.G. Defense counsel informed the court, "I have a Batson Wheeler."

The Hearing

At the hearing, defense counsel alleged the prosecutor used peremptory challenges on three prospective jurors. The court asked the prosecutor to explain why the three jurors were excused.

The prosecution stated N.C. was excused mainly because none of her answers "gave us any kind of reading about how she would vote one way or another." The prosecutor noted N.C. worked for Head Start and her husband worked for a rental agency. However, with the limited amount of time for questioning, nothing N.C. "told us in the Court's questioning gave us rise one way or another to what type of juror she would be. [¶] A lot of times . . . when we've been sitting here through selection, even when we don't specifically question a juror, the answers they've given the Court have been enough for us to determine. [N.C.'s] answers were so benign that we chose to exercise a peremptory challenge based upon the lack of information she provided and not wishing to waste any additional of our finite amount of time in trying to hash out one way or another. So that's why [N.C.] was excused."

The prosecution stated it excused R.G. for several reasons: "One . . . her facial expression brought to me that she was completely confused almost to the point of disoriented about what was going on. . . . So first off, she appeared to be confused throughout the entire time I could observe her in the jury box. Second, she works for the Department of Employment and Social Services. I know from my experience as a deputy district attorney going on over 16 years that the relationship between DESS and the DA's office is often one of acrimony. I know from experience there have been times where DESS has actually complained that badge-carrying, gun-carrying district attorney investigators are assigned to that office, and those investigators work for my office."

In addition, the prosecution noted R.G. described her position as a senior analyst with the DESS: "In my experience as a prosecutor, those people involved as senior analysts tend to be too fact wanting or too detail specific and are not good as jurors in cases where some of the evidence produced is going to be circumstantial evidence. For example . . . there is a significant gap in time in the cell phone records that apply to [Bristow]. We are going to ask the jury to follow circumstantial evidence to conclude what [Bristow] did during the time that we do not have cell phone records for him. And

in my experience, economist analysts are not good for that task. And we're going to be asking them to do a task like that? [¶] I would also note that by my count, of course, the jurors have all left. We have four Hispanic jurors seated in the group of 12 that still remain, and those are four Hispanic surnames. . . . [¶] So I would submit that even if [defense counsel] has raised a prima facie case to warrant a Batson Wheeler inquiry, our explanation for those jurors being dismissed certainly shows beyond a doubt that our reasons for kicking them are for facts related to the case and have absolutely nothing to do with their race."

The trial court considered the challenge to E.S. and determined there was a legitimate reason to excuse the juror. Defense counsel stated that the fact that there were four Hispanics remaining on the jury was "legally irrelevant." The court responded: "Well, I certainly agree with you, but it is not immaterial. It is simply not conclusive."

Although the court said it was not necessary, the prosecutor provided an explanation for the challenge to E.S.: "Just for purposes of the record and for any purpose of appeal, [E.S.] was asked about prior jury experience. [E.S.] said he had prior jury experience two years ago and recalled nothing of that prior jury service. That to me is problematic because we are looking for a group of 12 people plus alternates who are going to be paying attention and be engaged. I have no idea what kind of case that was, but with only one prior event of jury service, I would expect something to stick out in his mind if he was the type of juror we were looking for in this case, which is one to engage and follow along in a trail of facts both involving direct and circumstantial evidence."

The court noted there were four individuals with Hispanic surnames among the 11 potential jurors remaining. The court concluded: "The importance of counting the number of people with Hispanic surnames is simply to underline the fact that in this jury pool, we have a very substantial number of Hispanics, which is not unusual for Yolo County. Based on the information provided, I would find, first, that the reason [E.S.] was excused clearly has nothing to do with race. The reason why [R.G.] was excused

certainly makes sense based on what [the prosecution] said. And the reason [N.C.] was excused, while it nonplusses me a bit, has nothing to do with race. I don't find that explanation offered by [the prosecutor] is simply an attempt to mask the fact that the real reason was that she was Hispanic. So I would deny the Batson Wheeler objection based on everything in the record."

Discussion

Bristow contends the prosecutor's "inconsistent, implausible, and unsupported reasons for exercising three of its first nine challenges against Hispanic jurors did not offer substantial evidence to support the trial court's finding of nondiscrimination." We disagree.

A prosecutor's use of peremptory challenges to remove jurors solely on the basis of presumed group bias based on membership in a racial group violates both the federal and state Constitutions. (*People v. Taylor* (2009) 47 Cal.4th 850, 885.) *Batson*/*Wheeler* imposes a three-step inquiry into a prosecutor's use of peremptory challenges allegedly based on race. First, the court determines whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if such a showing is made, the burden shifts to the prosecution to demonstrate the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has shown purposeful discrimination. (*Rice v. Collins* (2006) 546 U.S. 333, 338 [163 L.Ed.2d 824].)

We review a trial court's ruling on whether or not a prima facie case has been established for an abuse of discretion. When a court finds the moving party fails to establish a prima facie case of bias, we uphold the ruling if supported by substantial evidence. (*People v. Johnson* (1989) 47 Cal.3d 1194, 1221; *People v. Jones* (1998) 17 Cal.4th 279, 293.)

As the parties acknowledge, it is somewhat unclear whether the trial court determined Bristow made a prima facie showing. The trial court did not make a specific

finding that Bristow made such a showing but did ask the prosecutor to explain his reasons for excusing the jurors in question.

In *Hernandez v. New York* (1991) 500 U.S. 352 [114 L.Ed.2d 395], after the defendant raised a *Batson*/*Wheeler* objection, the prosecutor did not wait for a ruling on whether the defendant had established a prima facie case of racial discrimination. The prosecutor instead volunteered his reasons for striking the jurors in question. The Supreme Court observed: "[T]he trial court had no occasion to rule that petitioner had or had not made a prima facie showing of intentional discrimination. . . . Once a prosecutor has offered a race neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant made a prima facie showing becomes moot." (*Id.* at p. 359; *People v. Scott* (2015) 61 Cal.4th 363, 393.) Accordingly, we consider the prosecution's response to the court's request.

The court invited the prosecution to explain why N.C. had been excused. After the prosecutor responded, the trial court observed: "Since you mentioned [R.G.], I invite you to explain why [R.G.] was excused." As for E.S., the court stated, based on the potential juror's answers, the prosecution had a legitimate reason to excuse E.S.

N.C.

Bristow argues the prosecutor did not pose a single question to prospective jurors R.G., E.S., or N.C. before challenging them. As for N.C., Bristow contends the prosecutor offered no reason whatsoever for challenging the juror; "The prosecutor simply claimed her answers were 'so benign' he could not say whether she would be a good or bad juror for the prosecution." Bristow oversimplifies the record.

N.C. was the prosecutor's seventh peremptory challenge and the prosecutor explained that he was exercising the challenge because N.C.'s responses, in the limited time permitted, provided no indication of how she would respond to the evidence. The prosecutor did not want to waste any additional of "our finite amount of time in trying to

hash out one way or another." The trial court considered the explanation and found the reason N.C. was excused, "while it nonplusses me a bit, has nothing to do with race. I don't find the explanation offered . . . is simply an attempt to mask the fact that the real reason was that she was Hispanic."

It is axiomatic that the trial court is in the best position to ascertain the validity of the prosecution's reasons for excusing a potential juror: "[T]rial judges know the local prosecutors assigned to their courts and are in a better position than appellate courts to evaluate the credibility and the genuineness of reasons given for peremptory challenges." (*People v. Johnson* (1989) 47 Cal.3d 1194, 1219, fn. 6.) We give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. (*People v. Lenix* (2008) 44 Cal.4th 602, 613-614.) The trial court's determination is a factual one, and if the court makes a sincere and reasonable effort to ascertain whether the proffered reasons are nondiscriminatory and the determination is supported by substantial evidence, we will not disturb it on appeal. (*People v. Thomas* (2011) 51 Cal.4th 449, 474.)

Here, the trial court observed voir dire, listened to the prosecution's explanation, and determined it was not based on the fact the potential juror was Hispanic. Bristow challenges the trial court's decision, arguing several other non-Hispanic jurors also provided limited information but were not excused. According to Bristow, "A comparative analysis shows the prosecutor did not strike non-Hispanic jurors who also provided spare biographical information."

A comparative analysis argument cannot be raised for the first time on appeal. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1197.) Moreover, the jurors in question were asked additional questions by defense counsel. One juror indicated she had previously served on a grand jury and that her former spouse's drug use would not impact her impartiality. Another juror discussed her work responsibilities, and the third also clarified her work position and stated that although she had visited prisons, she could be fair in the present case. A final juror stated her occupation, place of residence, and the

occupation of her spouse. Given the deference we show to the trial court and acknowledging the trial court's superior ability to observe and evaluate the potential jurors' demeanors, we find no merit in Bristow's contention.

E.S.

The trial court did not request an explanation for the peremptory challenge against E.S. but accepted the prosecutor's proffered explanation. The prosecutor stated E.S. recalled nothing of his prior jury service, which the prosecutor found problematic. Bristow contends the record does not support the prosecutor's given reason. We disagree.

E.S. stated he had recently served on a jury in a criminal case. Upon further inquiry regarding the charges, E.S. responded, "Somebody got beat up. I don't recall." When asked if the jury reached a verdict, E.S. stated, "I believe so." E.S.'s vague responses concerning his jury service support the trial court's finding of a lack of discriminatory intent in his dismissal.

R.G.

The prosecutor excused R.G. in part because her facial expressions gave the impression she was "completely confused almost to the point of [being] disoriented about what was going on." In addition, the prosecutor noted that R.G. worked for an agency that had an often acrimonious relationship with his office. Bristow argues the reasons given "do not withstand scrutiny."

However, both of the reasons given, the juror's demeanor and her adverse relationship with the district attorney's office, support the trial court's finding of a nondiscriminatory reason for R.G.'s dismissal. The demeanor of a juror may be a valid basis for a challenge, provided the demeanor-based reason is not pretextural. (*People v. Jones* (2011) 51 Cal.4th 346, 363-364) Excusing a juror based on the juror's professional background may be a valid reason for exclusion. (*People v. Granillo* (1987)

197 Cal.App.3d 110, 120, fn. 2.) We find sufficient evidence supporting the trial court's conclusion that the prosecutor's reasons for excluding R.G. were neutral and valid.

DISPOSITION

The judgments are affirmed.

RAYE, P. J.

We concur:

BLEASE, J.

DUARTE, J.